No. 82-38

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In the Supreme Court of the United States

OCTOBER TERM, 1982

PYRAMID LAKE PAIUTE TRIBE OF INDIANS
Cross-Petitioner,

vs.

TRUCKEE-CARSON IRRIGATION DISTRICT, et al.,
Cross-Respondents.

On Cross-Petition For a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

Brief for Respondent Sierra Pacific Power Company in Opposition

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QUESTION PRESENTED

Whether the final judgment in a water rights action to which all water users on the Truckee River and its tributaries in Nevada were parties and in which the implied reserved right to a specific quantity of water for the Pyramid Lake Indian Reservation was litigated and established bars a later action claiming an implied reserved right to a larger quantity of water?

LIST OF PARTIES

The United States was plaintiff and appellant below. The Pyramid Lake Paiute Tribe of Indians intervened as a plaintiff and was also an appellant. The defendants and appellees were the Sierra Pacific Power Company,* the Truckee-Carson Irrigation District (in its own right and with others as class representatives of reclamation project rightholders), the State of Nevada, the County of Washoe, the Cities of Reno and Sparks, Washoe County, and approximately 17,000 individually named persons, firms, partnerships, and corporations located in the State of Nevada. Nevada has filed a list of the approximately 17,000 defendants in this case with the Clerk of the Court. Nev. Pet. No. 81-2245 at ii n.*.

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*Sierra Pacific Power Company is a publicly held corporation listed on the New York Stock Exchange. It has no subsidiaries which are not wholly owned and has no affiliates.

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Brief for Respondent Sierra Pacific Power Company in Opposition

JURISDICTION

Sierra Pacific Power Company ("Sierra Pacific") adopts the statement of jurisdiction in the Cross-Petition. The

1. Petitions for writs of certiorari to review the same decision have been filed by the State of Nevada, No. 81-2245, and by the Truckee-Carson Irrigation District (TCID), No. 81-2276. Both petitioners filed separately bound Appendices pursuant to Supreme Court Rule 21.1(k). Respondent Sierra Pacific Power Company adopts those Appendices for purposes of this Brief. Unless otherwise noted, all references in this Brief will be to the Appendix filed by TCID in No. 81-2276. Such references will be indicated simply by the page number of that Appendix, *e.g.*, "A-15." Nevada's Appendix in No. 81-2245 will be cited as "Nev. App." Supplemental materials which are part of the record in this case and to which reference is made in this Brief are included in the Appendix to this Brief. That Appendix will be cited as "SPPCo. App."

Tribe's Cross-Petition was received on July 12, 1982. Pursuant to Supreme Court Rule 29.3, the Clerk extended the time to file this opposition to August 24, 1982.

RELEVANT CONSTITUTIONAL PROVISIONS

No Constitutional provisions are directly involved.

STATEMENT OF THE CASE[2]

The Pyramid Lake Indian Reservation was set aside in 1859 and confirmed by an executive order signed by President Grant in 1874. In 1902, Congress enacted the Reclamation Act. Pub. L. No. 57-161, 32 Stat. 388, 43 U.S.C. §§ 371-526. Shortly thereafter, the Secretary of the Interior withdrew land in Western Nevada for the first reclamation project under the Act. This became known as the Newlands Project. A-3 to A-4, A-96, A-99.

The Newlands Project and the Pyramid Lake Reservation each received water from the Truckee River. The flow of the Truckee River and its tributaries then, as now, fluctuated greatly. At times there was insufficient water available for all persons claiming water rights, including the Project and Reservation. For this reason, on March 3, 1913, the United States commenced a water rights action entitled *United States v. Orr Water Ditch Co.*, Equity No. A3 (1944) (*"Orr Ditch"*). Nev.App.9a to 10a. *Orr Ditch* was intended to be a general all-inclusive adjudication of all rights and claims to the waters of the Truckee River. A-33, A-100.

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2. The court of appeals applied the "clearly erroneous" standard to the district court's findings of fact. In those instances where there were mixed findings of law and fact, the court of appeals independently reviewed the evidence to assess those findings. A-20. In no instance did the court of appeals disagree with the district court's findings. This Court cannot disturb the concurrent findings of the courts below unless they are shown to be clearly erroneous. Faulkner v. Gibbs, 338 U.S. 267, 268 (1949); Blau v. Lehman, 368 U.S. 403, 409 (1962).

In *Orr Ditch*, the Tribe was represented by the United States. A-6, A-99. It was the intention of the United States to assert as large a water right as possible for the Pyramid Lake Reservation based on the implied reserved water rights doctrine recognized by this Court in *Winters v. United States*, 207 U.S. 564 (1908). A-6, A-100. In alleging the purpose of reservation, the United States in its amended complaint in *Orr Ditch* stated that the government was "desirous of protecting [the] Indians . . . in their homes, fields, pastures, *fishing*, and their use of said lands and waters." Nev. App. 6a. [Emphasis added.]

On February 13, 1926, after extensive litigation, a temporary restraining order was entered in *Orr Ditch*. The final judgment in the *Orr Ditch* action was entered some 18 years later on September 8, 1944. A-9, A-15, A-101. The final decree included an implied reserved right for the Pyramid Lake Indian Reservation to approximately 30,000 acre-feet of water with an 1859 priority. A-103.

From the beginning of *Orr Ditch* in 1913 to its conclusion in 1944, the Tribe possessed both the actual and the legal ability and capacity to intervene to assert a claim to additional water. A-101. During all of this period of time, the Tribe, as well as others, was aware of problems with the fishery, spawning runs, the lowering of Pyramid Lake, and diminished water flow. A-10 to A-14, A-101. The temporary restraining order was entered for the purpose, among others, of thoroughly testing before the entry of a final decree the preliminary water rights determination and the operation of the Truckee River thereunder. The proceedings were expressly left open for any person affected by the order to apply for its amendment, alteration or modification. A-101.

No attempt was made by the Tribe to intervene in *Orr Ditch*. No application was made by the Tribe for any alteration or modification of the temporary order. A-101. No appeal was taken by any party from the final judgment. A-15.

Northwest Nevada is an arid region. All facets of life in the area are therefore dependent upon the beneficial use of the waters of the Truckee River and its tributaries. SPPCo. App. 1a to 2a. All of the defendants in this action have relied directly and indirectly upon the terms, provisions and water rights declared in the *Orr Ditch* final judgment. A-105. Since September 8, 1944, when that final judgment was entered, billions of dollars have been spent on plants, agriculture, schools, parks, playgrounds and water distribution facilities, to name just a few. SPPCo. App. 2a. The United States and the Tribe also have accepted and enjoyed the benefits of the water rights and priorities decreed in *Orr Ditch*. A-104.

In December of 1973, the United States filed the present action suing both in its own right and in its fiduciary capacity on behalf of the Tribe. The Tribe was subsequently permitted to intervene. A-2 to A-3. Both the United States and the Tribe sought a decree quieting title to an implied reserved water right sufficient to maintain the level of Pyramid Lake and the lower reaches of the Truckee River for fishery purposes. A-2. The trial court held the claim by the Tribe and the United States to additional water for the Pyramid Lake Indian Reservation barred by the *Orr Ditch* final judgment. A-108.

On appeal, the Ninth Circuit affirmed in part and reversed in part. It held that, except for the Truckee-Carson Irrigation District ("TCID"), all defendants could successfully assert the *Orr Ditch* judgment as a bar. A-48 to A-50. With

respect to TCID, the court of appeals simply held that adversity under the pleadings, an essential element of the defense of res judicata, had not been present in *Orr Ditch* between TCID and the Tribe. A-51 to A-55.

The case was then remanded to the district court for a determination as to the existence of a reserved water right for fishery purposes as between TCID and the Tribe. If such a right exists, the district court must find a means of satisfying that right from the Reclamation Project water right in a manner that would minimize hardship on both the Tribe and the Project. A-55 to A-56, A-59 to A-60.

REASONS FOR DENYING THE CROSS-PETITION

I. THE NINTH CIRCUIT CORRECTLY DECIDED THE ISSUES PRESENTED BY THE CROSS-PETITION.

In affirming the res judicata bar, the court of appeals decided that the cause of action asserted by the United States and the Tribe was the same as the cause of action adjudicated in *Orr Ditch*. A-31 to A-34. It held that, in *Orr Ditch* the Tribe was in privity with the United States. A-45. It held that giving res judicata effect to the *Orr Ditch* judgment and holding the Tribe bound would not deprive the Tribe of due process. A-46 to A-47. It also held that subsequent appropriators can rely on the *Orr Ditch* decree as a final judgment. A-49, A-50. These issues were correctly decided and no review is merited.

A. The Cause of Action Here Is Part of the Same Cause of Action in *Orr Ditch*.

Among the claims adjudicated in *Orr Ditch* was a claim for an implied reserved water right for the Pyramid Lake Paiute Indian Reservation. A-32. The cause of action in this case also seeks the adjudication of such a right. A-32. The causes of action are one and the same.

A cause of action for an implied reserved water right for any federal reservation is established by proof only of the fact, date and purpose of the reservation. *See, Cappaert v. United States,* 426 U.S. 128, 138 (1976) and cases cited therein. As plaintiff in *Orr Ditch,* the United States alleged and proved the fact, date and purpose of the Pyramid Lake Paiute Indian Reservation. The complaint in this action also and necessarily alleges the fact, date and purpose of reservation. The court of appeals correctly held the cause of action thus stated to be part of the same cause of action previously adjudicated in *Orr Ditch.*

The Tribe complains that the court of appeals improperly applied retroactively some new and more expansive standard for the identity of causes of action. That argument is mistaken and misleading. It was well established long before *Orr Ditch* that a final judgment on the merits of an action precludes the parties or their privies from relitigating matters that were or could have been raised in that action. *See, e.g., Cromwell v. County of Sacramento,* 94 U.S. 351, 352-53 (1877). It is application of that doctrine that bars the Tribe here.

The Tribe advocates the "same evidence" test set forth in *United States v. "The Haytian Republic,"* 154 U.S. 118, 125 (1894), and Section 61 of the Restatement of Judgments (1942), as that in use during the period of *Orr Ditch.*[3] The focus of the same evidence test is on the evi-

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3. The "same evidence" test was not the only method used in the period of time that the *Orr Ditch* action was pending for determining identity of causes of action. For example, in Schuykill Fuel Corp. v. B&C Nieberg Realty Corp., 250 N.Y. 304, 165 N.E. 456 (1929), Cardozo set forth an impairment of rights test, *i.e.* whether the substance of the rights or interests established in the first action will be destroyed or impaired by the prosecution of the second. Even under that test, this action would be barred. Moreover,

dence necessary to prove the right to relief, as distinguished from the evidence necessary to prove the relief itself. As noted in Comment a to Section 61, if a plaintiff suffers harm to his person and property in an automobile collision and brings an action for the harm to his person, a judgment in that action precludes him from maintaining a second action for the harm to his property.

The same principle applies here. Throughout, the Tribe has failed to distinguish between the facts necessary to sustain the cause of action for an implied water right and the facts necessary to prove the relief, *i.e.*, the quantity of water. As the court of appeals noted, the evidence necessary to quantify the water needed to sustain the fishery may be different from the evidence necessary to quantify water needed for irrigation. However, the difference in that evidence does not create different causes of action. The Tribe's cause of action for an implied reserved water right was litigated in *Orr Ditch*. Under any standard, the attempt to relitigate that right here was properly held barred.

B. The Tribe Was Not Denied Due Process.

The "due process" question in this case is based solely on the Tribe's claim that it was represented inadequately in *Orr Ditch* and that, therefore, an exception to the ordinary rules of res judicata should be made permitting the Tribe to relitigate its water rights claim.[4] On the facts of this matter as determined by the lower courts, the Tribe was not

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prior to *Orr Ditch*, this Court had already taken an expansive view of res judicata in actions involving claims to property, holding that the United States was required to assert in a single action all the grounds it had for claiming certain land. United States v. California & Oregon Land Co., 192 U.S. 355, 359 (1904).

4. The Tribe's contention that only government officials and not private representatives are limited by due process constraints (Tribe's Cross-Petition at 13 text and ns. 7 and 8) misses the point.

denied due process and no exception to res judicata may be made.

Procedural due process, that is, notice and an opportunity to be heard, was afforded the Tribe in *Orr Ditch*. The Tribe was represented in *Orr Ditch* by the United States, an entity with full power and authority to represent it. *Heckman v. United States*, 224 U.S. 413, 444-46 (1912); *United States v. Minnesota*, 270 U.S. 181, 194 (1926); *United States v. California and Oregon Land Co.*, 192 U.S. 355, 358 (1904). The United States had adequate notice and opportunity to litigate all the issues and claims encompassed by *Orr Ditch*. The requirements of procedural due process were fully met.

The Tribe's true complaint is that no one, including the United States, knew what the law on *Winters* rights might be 60 years after *Orr Ditch* was begun and 29 years after it ended.[5] The requirement of procedural due process does

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Admittedly the cases involving alleged deprivations of rights guaranteed by the Fourteenth Amendment and in actions under 42 U.S.C. § 1983, "state action" or action "under color of state law" must be involved. Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978); Lugar v. Edmondson Oil Co., ... U.S. ..... (No. 80-1730, June 25, 1982). In this res judicata context, the due process question does not arise because the Tribe was represented by "government officials" in *Orr Ditch* (Tribe's Cross-Petition at 13), it arises because of judicial action which seeks to enforce the *Orr Ditch* judgment here. Hansberry v. Lee, 311 U.S. 32, 41 (1940); Kersh Lake Drainage Dist. v. Johnson, 309 U.S. 485, 490 (1940); Postal Teleg. Cable Co. v. City of Newport, 247 U.S. 464, 476 (1918).

5. Throughout the lengthy *Orr Ditch* proceedings there was substantial uncertainty as to the scope of the *Winters* doctrine. Its application to an executive order reservation was some 36 years away. *See* United States v. Walker River Irrigation District, 11 F.Supp. 158, 159 (D.Nev. 1935), *rev'd*, 104 F.2d 334, 336 (9th Cir. 1939). Its express extention to other federal reservations by Arizona v. California, 373 U.S. 546,601 (1963), was 50 years away. Furthermore, *Winters* contained language that implied, if it did not expressly state, that the purpose of Indian reservations was to make farmers of the Indians. *Winters*, 207 U.S. at 576.

not, and could not, impose such an impossible burden.[6]

In determining that there had been no denial of due process in *Orr Ditch*, the court of appeals assumed, but expressly did not decide, that the government's representation of the Tribe in *Orr Ditch* was improper and inadequate.[7] A-46 to A-47. The court's focus then correctly shifted to the knowledge, if any, of the *Orr Ditch* defendants of any such inadequate representation. *See, e.g., Kersh Lake Drainage District v. Johnson*, 309 U.S. 485, 491 (1940), *Kerrison*

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6. The cases relied upon by the Tribe do not apply. Armstrong v. Manzo, 380 U.S. 545 (1960), Schroeder v. City of New York, 371 U.S. 208 (1962), Walker v. City of Hutchinson, 352 U.S. 112 (1956), and Griffin v. Griffin, 327 U.S. 220 (1946), did not involve claim preclusion and in each the party claiming inadequate notice in a prior proceeding had not been represented in that litigation by anyone at all. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), and Hanson v. Denckla, 357 U.S. 235 (1958), are simply minimum contacts cases. In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), the question involved the kind of notice a beneficiary was to be provided of a proceeding which would bar the beneficiary's rights "to have the trustee answer for negligent or illegal impairments of [his] interests." 339 U.S. at 313. *Mullane* does not hold or even remotely suggest that the rights and interests of a trust beneficiary once determined in legal proceedings between the trustee and third parties are subject to relitigation because the beneficiary was not given notice of, or did not participate directly in, the proceedings.

7. The Tribe's Cross-Petition asserts that the court of appeals found that the "government's representation of the Tribe in *Orr Ditch* was improper and inadequate." Tribe's Cross-Petition at 8. That simply is not true. Based upon the assumption that it had made at the outset (A-46 to A-47), the court of appeals subsequently noted that the government's representation was "analogous to that of a faithless fiduciary." A-48 to A-49. Referring to the Restatement (Second) of Trusts § 170 comments p, q, and r (1957), the court of appeals also noted that by representing the Tribe and TCID in *Orr Ditch* the "government compromised its duty of undivided loyalty to the Tribe." A-52. The court never, at any point, made any determination that that compromise resulted in inadequate representation of the Tribe in *Orr Ditch*. The trial judge specifically found no such improprieties. A-107 to A-108.

v. Stewart, 93 U.S. 155, 160 (1876), Restatement (Second) of Judgments §42 (1982).[8] In that regard, the court of appeals noted that the trial judge found that any impropriety in the Government's representation in *Orr Ditch* was unknown to the defendants in *Orr Ditch*. A-47. It stated that it could not determine that that finding was clearly erroneous. A-47. Moreover, it specifically noted that the plaintiffs did not challenge that finding.[9] A-47.

Once inadequate representation is assumed, the relevant inquiry is whether the defendants knew. This Court has taken an even more restrictive approach in *Kersh* and *Kerrison*. In these cases a beneficiary was held bound by a judgment in an action in which he was represented by his trustee, an exception being made only where there had been fraud or collusion between the trustee and the adverse party.

None of the cases cited by the Tribe alter the rule established by this Court in *Kersh* and *Kerrison* or support the application of a different rule in the present case. Cases involving the Sixth Amendment's guarantee of the effective

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8. Since the court of appeals' decision, the Restatement (Second) of Judgments has been finally adopted by the American Law Institute. The substance of the tentative drafts relied upon by the court of appeals did not change, but the numbering of the sections did. References herein will be to the numbering used in the adopted version.

9. Having failed to challenge that finding on appeal, the Tribe cannot challenge it here. Pennsylvania R.R. Co. v. Illinois Brick Co., 297 U.S. 447, 463 (1936); cf. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 214 (1951). They attempt to do so, however, allegedly in the context of the burden of proof at trial. The "essential elements" of res judicata, (1) a valid and final judgment on the merits, (2) subsequent litigation on the same cause of action, and (3) involving the same parties or those in privity with them, were established by the defendants. The Tribe had the burden of proving an exception to the general rule once those essential elements were prima facie established.

assistance of counsel in criminal cases simply do not apply.[10] In the res judicata context the trustee-beneficiary situation is analogous to those civil cases where a party is inadequately represented by an attorney. In such cases the inadequately represented party is nonetheless bound by the result. Any different rule visits the sins of the party's lawyer upon the innocent opposition. *See Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 n.10 (1962), and cases cited therein.

Class action cases are also inapplicable. Certainly, the rule in class action cases is necessarily different from the rule to be applied in trustee-beneficiary cases. Class actions were devised as a means of permitting litigation to proceed even though not all interested persons could be joined. *Hansberry v. Lee*, 311 U.S. 32, 41 (1940). The authority to represent the "class" springs solely from the substantial "identity of interest" shared by the named parties and the unnamed class members. Rule 23(a), Fed.R.Civ.P; Restatement (Second) of Judgments § 42(d), Comment e (1982).

The authority of the United States to represent the Tribe in *Orr Ditch* was not based upon any "identity of interest." That authority was vested in the United States as sovereign and as trustee for its Indian wards.[11] In that context, the role and the duties and obligations of the United States were analogous to those of any trustee.

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10. Wood v. Georgia, 450 U.S. 261 (1981), Holloway v. Arkansas, 435 U.S. 475 (1978), Von Moltke v. Gillies, 332 U.S. 708 (1948) and Glasser v. United States, 315 U.S. 60 (1942).

11. Its representation of an Indian tribe is much different than its representation of public interests generally. The reference in Restatement (Second) of Judgments § 42, Comment f, relied upon by the Tribe, is to those situations where an action by or against a public agency or official would bar an action by ordinary citizens or taxpayers. It has nothing to do with those situations where the United States acts as trustee for its Indian wards.

Significantly, in this regard, a class representative cannot be sued for inadequate representation. An exception from the application of res judicata in the class action context may thus be appropriate. No similar reason for an exception to the res judicata bar can be found in the trustee-beneficiary context. A trustee can be sued for the breach of its fiduciary duty in the failure to represent a beneficiary adequately. In that context, the appropriate rule is that already adopted by this Court in *Kersh* and *Kerrison* which holds that, in the absence of fraud or collusion, a party represented by a trustee in an action is bound by the judgment in that action. Applying that law, the court of appeals correctly held the Tribe barred by the final judgment in *Orr Ditch*.

C. The Res Judicata Defense Is Available to Appropriators Who Were Not Parties to *Orr Ditch* but Who Have Relied on the *Orr Ditch* Decree.

The final *Orr Ditch* decree was entered in 1944. Since that time, additional appropriative water rights have been acquired pursuant to Nevada law by various individuals and entities. These subsequent appropriators acquired their rights subject to the rights adjudicated in *Orr Ditch*. 1 S. Weil, *Water Rights In The Western States* § 302 at 313-314 (3rd ed. 1911); *Proctor v. Jennings*, 6 Nev. 83, 88 (1870).

Because the subsequent appropriators took the stream as they found it, they acquired their rights in reliance on the finality and the substance of the judgment in *Orr Ditch*. The Ninth Circuit held that they were entitled to that reliance and to the protection of the principles of res judicata. A-49, A-50. The Tribe seeks review of that determination. No such review is merited.

The *Winters* "implied reservation of water rights" doctrine entitles a reservation to a certain quantity of water. The quantity of water reserved to the Pyramid Lake Paiute Indian Reservation was litigated in *Orr Ditch*. Neither the Tribe nor the United States can be permitted to relitigate that quantity as against either the parties to *Orr Ditch* or non-party subsequent appropriators relying on the *Orr Ditch* decree.[12]

Clearly, under the circumstances, any other result is untenable. As noted by the Ninth Circuit, *Orr Ditch* was "intended by all concerned lawyers, litigants and judges as a general all-inclusive water adjudication which sought to adjudicate all rights and claims" to the waters of the Truckee River. Its objective was a decree upon which all parties could rely. A-33, A-100. To achieve that end, *Orr Ditch* was made an adjudication that approximated a statutory *in rem* proceeding. The complaint was framed in the broadest possible way to assert the court's jurisdiction over all water users on the river. Both individual notice and widespread publicity of the action were provided. A-49.

Considering those circumstances, the court of appeals held that non-party subsequent appropriators who had relied on the finality of the comprehensive *Orr Ditch* adjudication were entitled to do so. The court recognized that it would be both unjust and unworkable from a practical standpoint to permit the party defendants in *Orr Ditch* to rely on the judgment and not permit subsequent appropriators[13] to do

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12. Under the prevailing law, nonparties may prevent that relitigation. Blonder-Tongue Laboratories v. University of Ill. Foundation, 402 U.S. 313, 323-25 (1971); Bernhard v. Bank of America, 122 P.2d 892, 894-95 (Cal. 1942).

13. It is doubtful that the Tribe's position would be improved even if it could assert its alleged fishery right against subsequent appropriators because those rights are "relatively few and minor."

the same. Furthermore, as the court of appeals correctly observed, such an exception would simply "make it impossible ever finally to quantify a reserved water right." A-50.

II. THE ISSUES PRESENTED HERE ARE CONTROLLED BY PRIOR DECISIONS OF THIS COURT.[14]

The issues raised by the Cross-Petition have already been decided many times by this Court and those decisions are controlling. This Court has many times defined a cause of action for an implied reserved water right as the fact, date and purpose of reservation. *See, e.g., Cappaert v. United States,* 426 U.S. 128, 138 (1976); *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 805 (1976); *United States v. District Court for Eagle County,* 401 U.S. 520, 522-23 (1971); *Arizona v. California,* 373 U.S. 546, 601 (1963); *FPC v. Oregon,* 349 U.S. 435 (1955); *United States v. Powers,* 305 U.S. 527 (1939); *Winters v. United States,* 207 U.S. 564 (1908). This Court has also held many times that an Indian tribe is ordinarily bound by a judgment entered in an action in which it was represented by the United States as its trustee. *See, e.g., Heckman v. United States,* 224 U.S. 413, 444-46 (1912); *United States v. Minnesota,* 270 U.S. 181, 194 (1926); *United States v. California & Oregon Land Co.,* 192 U.S. 355, 358 (1904).

Furthermore, this Court has already decided more than once that a beneficiary represented in litigation by a trus-

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Brief for Respondent Pyramid Lake Paiute Tribe of Indians in Opposition to Petitions of Nevada and TCID for Writs of Certiorari at 20.

14. As was recently noted, "there is little to be added to the doctrine of res judicata as developed in the case law of this Court." Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 101 S.Ct. 2424, 2427 (1981).

tee is bound by the final judgment entered in that litigation unless there is fraud or collusion between the trustee and the adverse party. *See, e.g., Kersh,* 309 U.S. at 491; *Kerrison,* 93 U.S. at 160. No issue of fraud or collusion was raised here. In fact, the trial court found and it was uncontested on appeal, that the *Orr Ditch* defendants had no knowledge of any improper or inadequate representation of the Tribe's interest by the United States. A-47.

The Tribe's Cross-Petition presents no new or substantial question which justifies discretionary review by this Court. Under the controlling decisions of this Court, the Tribe is bound by the *Orr Ditch* determination.

III. THERE IS RELIEF AVAILABLE TO THE TRIBE FOR ANY BREACH OF FIDUCIARY DUTY BY THE UNITED STATES.

The decision of the court of appeals is not only correct and controlled by previous decisions of this Court, it is also fair. The Tribe seeks to avoid the bar of the final judgment in *Orr Ditch* based upon an alleged breach of fiduciary duty by the United States in representing it in that litigation. The remedy sought by the Tribe, however, is the relitigation of the size of its 1859 implied reserved water right. That remedy runs not against the United States, the alleged wrongdoer, but against the *Orr Ditch* defendants and subsequent appropriators, innocent persons who have relied and who continue to rely on the *Orr Ditch* judgment and who neither participated in nor were even aware of any breach of duty.

It is the established rule that, in the absence of fraud or collusion between the trustee and the adverse party, neither the faithless trustee nor the injured beneficiary can shift

the beneficiary's losses to the adverse party.[15] *Kersh*, 309 U.S. at 491; *Kerrison*, 93 U.S. at 160; *cf. Link*, 370 U.S. at 634 n.10. That is a rule of fundamental fairness as well as of due process.

If the United States breached its fiduciary duty to the Tribe, the Tribe's recourse ought to be against the United States. That remedy is and has been available to the Tribe and has, in fact, been used. Congress has provided remedies and established a procedure for obtaining and recovering the value of any rights lost by such breach. Indian Claims Commission Act, 25 U.S.C. §§ 70-70v-3 (1976 and Supp. IV 1980). If, in *Orr Ditch*, the United States breached some duty it owed the Tribe, the Tribe certainly has an action for that breach. In fact, on July 23, 1975, the Tribe was awarded $8,000,000 by the Indian Claims Commission "for the loss of the Tribe's alleged . . . *Winters* reserved water rights for the Pyramid Lake fishery and other alleged water rights." A-106 to A-107.

In addition, the United States has the power to allocate and spend federal funds to restore the fishery artificially and it has done just that. Between 1973 and 1976, some $32,000,000 in federal funds alone, not including expenditures by the State of Nevada, were spent to restore the Pyramid Lake fishery. A-106. Furthermore, since the trial and during the appeal in this action, Congress appropriated and spent an additional $2.3 million to construct a second fish hatchery at Pyramid Lake. It has appropriated $2.1 million for operation of the Reservation fish hatcheries for fiscal years 1981 and 1982.

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15. "Due process" not only limits a court's power to give effect to a judgment, it also limits the power to refuse effect to such a judgment or to restrict that effect. 1B J. Moore, Moore's Federal Practice ¶ 0.406[2] at 906-07 (2d ed. 1982).

Relief is available and has in fact been provided to the Tribe from the United States. Additional relief at the expense of innocent parties would be neither fair nor legally justifiable.

CONCLUSION

For all of these reasons, it is respectfully submitted that this Court should, in the exercise of its discretion, decline review.

Respectfully submitted this 24th day of August, 1982.

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Appendix

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United States District Court
District of Nevada

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Civil No. R-2987-JBA

UNITED STATES OF AMERICA,
Plaintiff,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Plaintiff-Intervenor,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, et al.,
Defendants.

FINDINGS AND ORDER

In this case the Court takes judicial notice that all defendants have relied upon the terms, provisions, and the various water rights declared and decreed by this Court in the *Orr Water Ditch Co. Decree,* Equity No. A-3, entered the 8th day of September, 1944. That such reliance has been either direct by reason of the ownership of certain of the decreed rights by defendants or indirect by reason of the dependence of the defendants on waters the right to the use of which has been decreed to others in the *Orr Ditch Case.*

The Court further finds and judicially notices as a fact that in the area of Northwest Nevada the water rights decreed in the *Orr Ditch Case* are in an arid and dry region

and that all facets of life and economy in said area have been and are dependent upon the beneficial use of the waters of the Truckee River and its tributaries. These areas of Northwest Nevada are typical of the many arid regions of other Western States or portions thereof.

The Court further finds and judicially notices that if the defendants were permitted to do so that they would severally and collectively produce before this Court credible evidence of the investment since 1944 of billions of dollars in improvements for plants and facilities, agricultural improvements, schools, universities, parks, playgrounds, swimming pools, golf courses, fire protection, domestic and culinary water distribution and sanitation systems, and other municipal, and industrial facilities and operations; that there are improvements and investments of a like and similar nature which are presently underway; and that there has been a very steady population growth in said area since 1944.

No witnesses need or may be called by defendants to establish the precise details of such investment or of population or economic statistics or other factors set forth herein. However, any party may offer summaries as to the details of the matters covered herein.

DATED: April 2, 1976

J. BLAINE ANDERSON
J. Blaine Anderson
United States District Judge